(26,556)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 476.

RICARDO CARTAS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 3, 1918.

1 I.—*Petition. Filed April* 8, 1902.

In the Court of Claims of the United States.

No. 22,852.

RICARDO CARTAS

vs.

THE UNITED STATES.

Petition.

[Filed April 8, 1902.]

To the Chief Justice and Judges of the Court of Claims:

The petition of Ricardo Cartas, of Nassau, in the Bahama Islands, respectfully represents as follows:

He is a British subject, of Cuban parentage, being the grandson and the only living descendant of Carlos de Castillos, formerly a banker of Havana.

In January, 1869, at the beginning of the revolutionary outbreak, the said Castillos, being under suspicion by the Spanish authorities, entrusted to the United States Consul at Havana, H. R. Le Reintre, three thousand (3,000) ounces in Spanish gold, equivalent to fifty-one thousand dollars ($51,000), viz., for safe keeping by the United States Government, until called for. This contract was evidenced by a certificate with the great seal of the Consulate attached thereto, which was delivered to Castillos, and it further appeared thereby that said sum was placed on board the United States flag-ship Contoocook. Castillos gave the certificate to his wife, and shortly thereafter, to wit, on the same day as the deposit, he was arrested, conveyed to the Moro Castle, and, after a short time, deported to the Island of Fernando Po. Following his arrest, and during all the time of his detention by the Spanish Government, as aforesaid, which comprised about twelve months, Castillos was without means of communication, or incommunicado.

No demand for the said sum, or any part thereof, has ever been made by Castillos, or any other person entitled through him. From his wife Maria del Castillos, to whom he had delivered the certificate, it passed after her decease to her other grandson, Carlos Oruzcoe, now deceased, by whose former guardian, Pablo Borghes, and his attorney, W. Hunt Harris, both now or late of Key West, Florida, it is now improperly withheld from your petitioner.

No assignment or transfer of the said claim, or of any part thereof, or interest therein, has been made, and the petitioner is the sole person now having any interest, having derived it by operation of law, to wit, one-half from his grandfather, the said Castillos, through peti-

tioner's mother, Ramona, wife of Ricardo Cartas, the elder, and the other half from petitioner's cousin, Carlos Oruzcos, aforesaid, all of whom died intestate with respect thereto.

In the year 1884 the father of your petitioner, also named Ricardo Cartas, made inquiry of the Department of State at Washington, through the Vice-Consul-General of the United States at Havana, concerning this fund and its disposition, and the statement was elicited from the Navy Department that the officer in command of the Contoocook, at Havana, in 1869, reported in 1884 that he had on April 3, 1869, paid the sum so deposited to one "Senor Arredondo, who held a power-of-attorney from Don Carlos Castillos."

2 Early in the year 1899 your petitioner, through W. Hunt Harris, above referred to, communicated likewise with the Department of State, and obtained copies of said correspondence of 1884, but no fuller or further information.

Your petitioner, as well as the said Castillos and his other descendants, now deceased, have continuously resided and been outside of the limits of the United States, and your petitioner, since reaching his majority, has diligently, so far as his circumstances would permit, investigated the status of the said fund.

He avers:

First. That this money, being payable on demand, and demand never having been made until now, the claim has not hitherto accrued, and no limitation has run against this action for the same.

Second. That all the persons interested being beyond seas, as above stated, or while minors or femes covert or three years thereafter, no act of limitation has begun to run against them.

Third. That if said fund was paid to any one holding a forged power-of-attorney, the Government is not relieved by such payment.

Fourth. That the burden is on the Government to prove such payment, and to produce, or otherwise prove, the authority therefor.

Wherefore, your petitioner is justly entitled, after deducting all just credits and set-offs (unless some defence can be made out as indicated by the Navy Department as aforesaid) to the sum of fifty-one thousand dollars, together with such interest from January, 1869, to the date of judgment, as, under the terms of the contract with respect thereto, when the same are determinable, may be legal and just; for all of which he asks judgment. And he will ever pray, etc.

RICARDO CARTAS.

JOHN S. BLAIR,
Attorney for Claimant.
THOMAS M. HENRY,
Of Counsel.

BAHAMA ISLANDS,
New Providence, Nassau, ss:

Before me, Thos. J. McLain, United States Consul, personally appeared the above-named Ricardo Cartas, who, being duly sworn according to law, deposes and says that the statements contained in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 31st day of March, 1902.

[U. S. Consulate Seal, Nassau, N. P.]

THOS. J. McLAIN,
United States Consul.

3 II.—*Traverse. Filed November* 10, 1902.

In the Court of Claims of the United States, December Term, A. D. ——.

No. 22852.

RICARDO CARTAS

vs.

THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and very allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.

III.—*Motion to Substitute New Attorney of Record.*

On March 27, 1903, John S. Blair the attorney of record, filed a motion that Thomas M. Henry, Esq., be entered as attorney of record, which was allowed by the Court on the same day.

IV.—*Argument and Submission of Case.*

On January 14, 1913 the case was argued by Mr. William R. Andrews and Mr. Thomas M. Henry, for claimant, and by Mr. George M. Anderson, for defendant, and submitted.

4 V.—*Opinion of the Court. Filed February* 10, 1913.

BARNEY, *J.*, delivered the opinion of the court.

This suit is brought to recover the sum of $51,000 alleged to have been deposited for safe-keeping pursuant to Navy Regulations with the officer in command of a United States naval vessel. The facts set out in the petition are in substance as follows:

The claimant is the grandson and the only living descendent of one Carlos de Castillos. In January, 1869, which was about the beginning of the revolutionary outbreak in Cuba, Castillos, being under suspicion by the Spanish authorities, intrusted to the United States consul at Habana, Cuba, 3,000 ounces of Spanish

gold of the value of $51,000 for safe-keeping until called for. This deposit was evidenced by a receipt of the consulate whereby it appeared that said gold was placed on board the United States flagship Contoocook. It is further averred that neither said Castillos nor any of his heirs or legal representatives has ever made any demand for said gold before the bringing of this suit, and, though the petition is somewhat obscure upon that point, we assume that it is claimed that no part of said gold or its value has ever been paid either to said Castillos or any one authorized to receive the same. It should be added that the record produced on the trial of this case shows that gold of the value alleged was received by Capt. Balch, then commanding the flagship Contoocook, about the time alleged, from some party while said flagship was in the harbor of Habana.

For the exoneration of Captain (now Admiral) Balch from all wrong in this matter it should be stated that upon the trial of this case it was shown conclusively that very soon after he received it he turned over the gold in question to a party who he at least had goon reason to believe was entitled to receive it; but as we think this case turns upon the question of jurisdiction the merits of the case are not considered.

Capt. Balch received the gold pursuant to certain Navy Regulations then in force, which are as follows:

Article 8 of the Articles for the Government of the Navy, provides for certain offenses for which persons in the Navy may be punished, and among others it provides punishment for any such person who "takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale, or traffic, except gold, silver, or jewels, without authority from the President or Secretary of the Navy."

The Navy Regulations then in force, under said articles provided as follows:

"1020. When gold, silver, or jewels shall be placed on board any vessel of the Navy for freight or safe-keping, the commander of the vessel shall sign bills of lading for the amount, and be responsible for the treasure. The usual percentage shall be demanded from the shippers of the treasure, and its amount shall be divided as follows: One-fourth to the commander in chief of the squadron to which the vessel may belong; one-half to the commander of the vessel; one-fourth *the* the Navy pension fund. When a commander in chief of a squadron does not participate in a division of the amount, then two-thirds of the whole of it shall inure to the commander of the vessel and the remainder to the pension fund."

If the plaintiff is to recover in this suit it can only be on the theory that the Government was a bailee of this gold, and either that it has never returned it and still has it in its possession, at least constructively, or that it has lost it through the negligence of its officers.

In Kelsey v. United States (1 C. Cls., 374) the plaintiff had deposited with a United States quartermaster money as a pledge for the good faith of his bid. He complies with the conditions of the proposals, but before the contract is executed it is agreed that the proposals and all subsequent proceedings shall be cancelled. The money deposited is not returned and is paid into the Treasury by the quar-

termaster. It was held that an action would lie against the Government to recover it back.

In Sausser v. United States (9 C. Cls., 338) a distiller, pursuant to Treasury regulations, made application for a meter and deposited the prescribed amount with a deputy collector who receipts for it. The deputy collector does not pay over the money to the manufacturer of the meter, but embezzles it. Held that an action would lie against the Government to recover such deposit back. In delivering the opinion of the court, Nott, J., said:

"The Government chose to assume the responsibility of receiving these deposits, instead of allowing distillers to deal directly with the manufacturers of the meters. The collector was the agent of the Government, which had a discretion in selecting him, and was not the agent of the distiller, who was compelled against his wishes to deal with him. The loss, therefore, must fall upon the principal of this agent, which is the Government."

5 In Boughton v. United States (12 C. Cls., 330), it was held that where a party deposits money with a collector of internal revenue, with authority to apply it to a proposed compromise of certain revenue demands then pending against the depositor, but the collector, after the proposed compromise has been rejected by the Government, applies the money to an assessment against the depositor, and pays the money into the Treasury, this court has jurisdiction of an action to recover the money back.

In Pharis v. United States (16 C. Cls., 501), a quartermaster, in May, 1865, had in his custody a piano which he sold to the claimant, pursuant to an order of the commanding officer of the Military District of Southwest Missouri, directing all commissaries and quartermasters throughout the district "to sell such property not suitable for use or issue as may have been, or may hereafter be, turned over to them by the officers of the provost-marshal's department." Subsequently the owner of the piano brought an action of replevin against the claimant and recovered it from him. The claimant brought suit against the Government to recover back the purchase money of the piano and the costs to which he had been subjected. Jurisdiction was denied on the ground that the evidence did not show that the proceeds of the piano ever reached the Treasury. In delivering the opinion of the court, Nott, J., said:

"If an action like this can be maintained against the Government (upon which point we express no opinion) it is manifest, we think, that it must stand upon the basis of the Government having in its possession money of the claimant which, in equity and good conscience, it should not withhold from him, and for which, upon a well settled principle of law, he should have an action to recover it back as money had and received to his use."

In the recent case of Kyle v. United States (46 C. Cls., 197), a suit was brought by a private in the Marine Corps who was acting as post barber, to recover back money which he had paid as a tax into the "post fund," which is a fund derived from economical administration of post domestic affairs, voluntary contributions, etc., and expended for the betterment of post conditions among the marines; and is collected and managed pursuant to the Navy Regulations.

This court denied jurisdiction, and the court in its opinion said: "The defendants are neither parties to nor privy with the transactions in the sense of legal responsibility to respond in damages for its collection or disbursement."

Other cases might be cited bearing upon the question from all of which we deduce the general principle as to the jurisdiction of this court to entertain cases for the recovery of money back which has been paid to officers of the Government, to be either that the money so sought to be recovered has actually reached the Treasury, or has been paid to some officer of the Government authorized by some law or regulation to receive it for the use of the United States.

We think the averments in the petition in this case fall far short of either of these requirements. By the Navy Regulations quoted the Government did not become a common carrier (even if it were possible for it to do so); on the contrary it especially negatives that relation for it says that where "gold, &c., is placed on board * * * the captain shall * * * be responsible for the same." The reason for this regulation is not far to seek. The commanders of our war vessels were doubtless often importuned to carry valuables from one port to another, and this regulation simply permitted it, and to prevent extortion prescribed the charges to be made and the disposition of such charges, with a provision that a portion of the same should be placed in the Navy pension fund, thus making the whole transaction very similar to the accumulation of the "post fund" involved in the Kyle case, supra.

We see no difference in the liability assumed by the Government in the case under consideration and that assumed by at one time allowing rural carriers to carry express matter to piece out their salaries. By an act of Congress of April 22, 1902 (32 Stat., vol. 1, pp. 107, 113) Congress provided that rural carriers "shall not be prohibited from doing an express-package business, provided it does not interfere with the discharge of their official duties."

Thus rural carriers were permitted to do exactly the same kind of business the Navy Regulations under consideration permitted naval officers to do. In the case of naval officers the Government expressly denied any liability on its part; in the case of rural carriers nothing was said on this subject.

We hardly think anyone would contend that if a rural carrier through negligence had lost a package of gold intrusted to him or had embezzled it, the Government would be liable for his miscarriage; and if not why should it be liable for the miscarriage of a naval officer under this Navy regulation?

We do not think a claim against the United States such as alleged in the petition in this case can be maintained, and the petition is dismissed.

6 VI.—*Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Fourteenth day of January, A. D. 1913, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the de-

fendant and do order, adjudge and decree that the petition of the claimant, Ricardo Cartas, be and the same is hereby dismissed.

BY THE COURT.

VII.—*History of Proceedings After Entry of Judgment.*

On March 7, 1913 the claimant filed a motion for a new trial which was ordered to the Law Calendar.

On January 28, 1914 the claimant filed a motion to remand the case to the general docket, which was allowed by the Court January 28, 1914.

On March 6, 1915 the claimant filed a motion to place case on Calendar which was allowed March 3, 1916.

On November 13, 1916 the claimant's motion for a new trial was submitted by defendant, no attorney appearing for claimant, and thereupon ordered that the motion be overruled.

VIII.—*Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause on the thirteenth day of November, A. D. 1916, in favor of the defendants, the claimant, by his attorney, on the thirtieth day of January, A. D. 1917, makes application for and gives notice of an appeal to the Supreme Court of the United States.

THOMAS M. HENRY,
Attorney for Claimant.

Filed January 30, 1917.

Allowed by the Court as prayed for.
February 19, 1917.

7 Court of Claims.

No. 22852.

RICARDO CARTAS

vs.

THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court; of the judgment of the Court; of a history of proceedings after entry of judgment; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 20th day of February, A. D. 1917.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,556. Court of Claims. Term No. 476. Ricardo Cartas, appellant, vs. The United States. Filed May 29th, 1918. File No. 26,556.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 122

RICARDO CARTAS, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

WILLIAM R. ANDREWS,
THOMAS M. HENRY,
GEORGE H. LAMAR,
Attorneys for Appellant.

J. D. MILANS & SONS, 917 EIGHTH STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 476.

RICARDO CARTAS, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

STATEMENT.

On January 26, 1869, Carlos del Castillo, then a banker in Havana, Cuba, being suspected by the Spanish authorities of aiding the Cuban Rebellion, and fearing arrest and the confiscation of his property, deposited with the United States Vice-Consul-General at Havana 3,000 ounces of Spanish gold valued at $51,000, which gold was to be placed on board the United States Flagship *Contoocook* for safekeeping and until called for (Rec., pp. 1, 2, 3, 4).

When the deposit was made Castillo received a receipt which reads as follows:

> "CONSULATE GENERAL OF THE UNITED STATES OF AMERICA.
>
> Havana, January 26, 1869.
>
> Received of Mr. Carlos del Castillo the sum of three thousand Spanish ounces, or fifty-one thousand dollars, to be placed on board the U. S. Flagship *Contoocook* for safekeeping and until called for.
>
> $51,000. H. R. LE REINTRE,
> *U. S. Vice-Consul-General.*"

The captain of the battleship received said deposit under the provisions of the Articles for the Government of the Navy and the regulations thereunder, then in force, which are as follows:

Article 8 of the Articles for the Government of the Navy provides, among other things, that any person in the Navy who "takes, receives, or permits to be received on board the vessel to which he is attached, any goods or merchandise, for freight, sale, or traffic, except gold, silver, or jewels, without authority from the President or Secretary of the Navy," shall be guilty of a punishable offense.

Section 1020 of the Navy Regulations provides that:

> "When gold, silver, or jewels shall be placed on board any vessel of the Navy for freight or safekeeping, the commander of the vessel shall sign bills of lading for the amount, and be responsible for the treasure. The usual percentage shall be demanded from the

> shippers of the treasure, and its amount shall be divided as follows: One-fourth to the commander-in-chief of the squadron to which the vessel may belong; one-half to the commander of the vessel; one-fourth to the Navy pension fund. When a commander-in-chief of a squadron does not participate in a division of the amount, then two-thirds of the whole of it shall inure to the commander of the vessel and the remainder to the pension fund."

A few days after the making of this deposit Carlos del Castillo was arrested by the Spanish authorities and held *incommunicado*. On May 21, 1869, he was deported to the Island of Fernando Po, on the West Coast of Africa, where he was imprisoned for about a year (Rec., pp. 1, 2, 3, 4).

On April 20, 1869, Captain Balch, the commander of the ship *Contoocook,* reported the transaction to the Secretary of the Navy, and asked instructions as to the disposition of the share of the commission due the Navy pension fund.

After Castillo's escape or release from imprisonment he took up his residence in Nassau and remained there until his death.

In the year 1884, appellant's father made inquiry of the State Department, through the Vice-Consul-General at Havana, concerning the deposit and its disposition. The subsequent investigation elicited the statement from Admiral Balch that he had delivered the gold in person to a Cuban banker named Arridondo, who, he had heard, held a power of attorney from Castillo.

On April 8, 1902, appellant filed his petition in the Court of Claims, in which he alleged, substantially,

the foregoing facts, and prayed judgment against the United States in the sum of $51,000.

On February 10, 1913, the Court of Claims held that the Government was not a party to the transaction in question, and that Captain Balch acted solely in his individual capacity, in consequence of which the Court was without jurisdiction to entertain the suit.

From the judgment of the Court of Claims the plaintiff has prosecuted an appeal to this Court, and in support thereof we submit the following:

Argument.

Appellant bases his right of action herein upon the proposition that the transaction in question constituted an express contract of bailment between him and the Government, and that Captain Balch acted as the agent of the Government and not as a principal.

It is obvious that the Navy Regulations under which the deposit was made authorize a bailment, and that either the Government or the commander of the vessel became the bailee; and if the Government became the bailee it is unquestionably liable for a breach of the contract.

The Gulf Transit Company, 43 C. Cls., 183.

The case would therefore seem to rest, so far as the question of the jurisdiction of the Court of Claims is concerned, upon the proper construction of the Navy Regulations.

Specifications of Error.

1. The Court erred in holding that the Government was not a party to the transaction and that Capt. Balch acted solely in his individual capacity.

2. The Court erred in not holding that Capt. Balch acted in the transaction as the duly authorized agent of the Government and that the Government is bound by his acts.

3. The Court erred in holding that it had no jurisdiction.

4. The Court erred in holding contrary to the law.

5. The Court erred in dismissing the plaintiff's petition.

6. The Court erred in not rendering judgment for the plaintiff.

It is submitted that the regulations in question constituted the Government the bailee of the deposit, and that the commander of the ship was merely charged with the duty of carrying out the contract as the agent of the Government. The phrase "the captain shall * * * be responsible for the same," is clearly used in the sense that he shall be responsible or accountable to the Government for the proper performance of his duties in this respect, and not that he alone shall be liable to respond in damages to the bailor for any misfeasance or nonfeasance.

The words "responsible" and "accountable" occur frequently in the Navy Regulations in instances where no other meaning could be properly attributed to them. For example, Section 1474 provides for certain disbursements by order of commanding officers, and that the commanding officers "shall be held accountable for the same." Section 1475 provides that the pay officer may object if he believes the order illegal, and "the commanding officer will be held responsible if the expenditure is erroneous."

Section 1354 recites that the pay officer is "held responsible" for the condition of provisions and other supplies in his charge.

Section 1366: "The heads of departments of a ship shall be held responsible for supplies turned in, during transit to the places designated for their reception."

It will thus be seen that the Navy Regulations not only enjoin upon designated officers the performance

of specified duties, but in many instances specifically state that the officer designated shall be responsible or accountable for the duty thus imposed upon him. And this being the case, it seems only reasonable that nothing more or less was intended by the declaration that the commander of the ship should be responsible for treasure placed on board his ship for transportation or safekeeping.

That the captain of the vessel is the agent of the Government and not of the depositor, is further evidenced by the facts that the Government fixes an arbitrary charge for the service, of which it receives a portion, and that it designates the custodian of the treasure without permitting the depositor any choice in this respect.

The commander-in-chief of the squadron is entitled under the Navy Regulations to one-fourth of the commission received. If the transaction is, as held by the Court below, one exclusively between the depositor and the commander of the vessel, why should the commander-in-chief of the squadron share in the commission? If the Government simply permits the commander of the vessel to engage in the business of transporting and safeguarding money and treasure, it might exact of him a portion of his earnings in the way of a special occupation tax. But why should it compel him to give one-fourth of his earnings to the commander-in-chief of the squadron if he is not responsible in any degree for the private transaction of the commander of the vessel?

The division of the commissoin prescribed by the regulations is clearly based upon the fact that the commander of the vessel is charged with the duty of

safekeeping the treasure in his physical possession; the commander-in-chief of the squadron performs the duty of giving to the treasure the immediate protection of the squadron under his command; and the treasure is further protected by the responsibility of the United States Government itself. The regulations thus divide the commission equitably and reasonably, allowing to the Government one-fourth for its general protection, one-fourth to the commander-in-chief of the squadron for his extra duties in connection with the duty of his squadron to protect the treasure, and one-half to the commander of the vessel for his extra duties in connection with receiving the treasure, keeping it safely in his physical possession, and properly delivering it, being personally responsible to the Government for his actions in this respect.

If the purpose of the regulation had been merely to permit a naval officer to engage in the business of transporting and safekeeping valuables as a private business, it is inconceivable why this privilege was not extended to officers of lower rank, especially pay officers, and why an arbitrary commission should be required in every case. If some regulation of the charge was necessary to prevent extortion, a maximum rate would have accomplished the purpose, and, subject thereto, the commander of the vessel would be enabled to charge what the parties should agree upon as reasonable and just.

The Act of Congress which permits rural letter carriers to engage in the express-package business, provided it does not interfere with the discharge of

their official duties, makes no provision as to the rates for expressage, nor does it require that any part of the profits be paid to or for the benefit of the United States. Further, it does not require the rural carriers to engage in such business, but merely permits them to do so; while the Navy Regulations make it the duty of the commander of the ship to receive the treasure for transportation or safekeeping.

Another dissimilarity between the two cases is that under the Navy Regulations the valuables are transported or kept on Government vessels, while the rural carriers use their own conveyances for their private express businesses.

The case of Kyle vs. United States, 46 C. Cls., 197, cited in the opinion in the case at bar, would seem in conflict with the more recent case of Woog (48 C. Cls., 80), where the Court held that:

> "A 'post exchange' company fund constitutes a trust of which the soldiers are the beneficiaries. The officer intrusted with it does not receive it as an individual, but as a disbursing agent of the Government, and is as responsible for it as for any other money confided to his care as a disbursing officer."

In the case of Coleman vs. United States, 38 C. Cls., 315, it was held that money paid by drafted men to a provost-marshal for the purpose of procuring substitutes was received by him in his official capacity, although he was without express authority from the Government to receive it, the Court saying (pp. 335-6): "* * * but for the official station

conferred upon him by authority of the Government, Coleman would have received none of the money. * * *"

We submit that it is even more apparent that treasures of great value deposited under express governmental regulations with the captain of a war vessel at a foreign port are deposited with that officer in his official capacity and on the credit of the Government. It would hardly seem reasonable to suppose that such deposits would be made upon the credit of an individual officer whose ship might sail any day and whose individual financial responsibility could seldom be known to the depositor. Nor could the large commission fixed by the Navy Regulations be justified upon any ground other than that the credit of the Government was pledged for the faithful performance of the contract.

It is therefore respectfully submitted that the judgment of the Court below was erroneous and should be reversed.

WILLIAM R. ANDREWS,
THOMAS M. HENRY,
GEORGE H. LAMAR,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 122.

RICARDO CARTAS, APPELLANT,

vs.

THE UNITED STATES.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

Appellee's motion to dismiss or affirm is based upon the propositions that (a) the Court below failed to make findings of fact as required by the rules of this Court, and (b) the question on which the jurisdiction of the Court below depends is so frivolous as to need no further argument.

The rule requiring the Court of Claims to make and file findings of fact in all cases appealable to this Court has no application to cases heard upon demurrers to petitions and those in which it is held that the Court is without jurisdiction of the subject matter.

A demurrer admits all facts properly pleaded, and in such case the averments of the petition furnish the facts to which the Court must apply the legal principles neces-

sary to determine the case. Where the Court is without jurisdiction it is obvious that no findings of fact can be made, for the Court in such case cannot weigh the evidence, or perform any of the functions of a jury in establishing a matter of fact, its sole function being to dismiss the petition upon the theory that proof of the facts alleged would not establish a case within its jurisdiction. Clearly, therefore, a conclusion by the Court of Claims that it has no jurisdiction over the subject matter in a given case precludes the making of findings of fact and requires the adjudication of the case upon the legal assumption, as in case of a demurrer, that the facts alleged are true for the purpose of the decision on the question of jurisdiction. The question of jurisdiction could very properly have been raised by demurrer. In fact the making of the issue in this manner would have presented this question for decision in advance of the trouble and expense of taking testimony on the merits. There would seem no difference in the principle, so far as the making of findings of fact is concerned, whether the question of jurisdiction is raised by a demurrer or otherwise.

The question upon which the jurisdiction of the Court depends is, it is submitted, a substantial one that warrants the consideration of the appeal in regular course. The appellee admits that the regulations involved are authorized by statute, and the construction of these regulations is fully discussed in the briefs heretofore filed.

It is submitted, therefore, that the motion to affirm or dismiss should be overruled, or, at least, that it should be postponed until the hearing on the merits and the case sent to the Summary Docket.

WILLIAM R. ANDREWS,
THOMAS M. HENRY,
GEORGE H. LAMAR,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

RICARDO CARTAS, appellant,
v.
THE UNITED STATES. } No. 122.

APPELLEE'S MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

The appellee, by the Solicitor General, moves the court to dismiss the appeal from the judgment of the Court of Claims upon the ground that the transcript of record contains no facts upon which this court can base a judgment, or in the alternative, to affirm the judgment of the Court of Claims upon the ground that the claim does not come within the purview of paragraph 13, article 8, of section 1624, Revised Statutes, nor section 209 of the Regulations of the Navy, issued April 18, 1865, thereunder, and that the record on its face shows that the appeal is frivolous.

ALEX. C. KING,
Solicitor General.
FRANK DAVIS, JR.,
Assistant Attorney General.

127067—19

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT.

STATEMENT.

On April 8, 1902, the appellant filed a petition in the Court of Claims setting out his cause of action (Rec. 1–3), and on November 10, 1902, the United States filed a traverse to said petition denying "each and every allegation therein contained" and asked that the petition be dismissed (Rec. 3).

The case was thereafter heard on merits and a judgment was entered dismissing the petition, with an opinion by Judge Barney (Rec. 3, 4), which reads in part:

> This suit is brought to recover the sum of $51,000 alleged to have been deposited for safe-keeping pursuant to Navy Regulations with the officer in command of a United States naval vessel. The facts set out in the petition are in substance as follows:
>
> The claimant is the grandson and the only living descendant of one Carlos de Castillos. In January, 1869, which was about the beginning of the revolutionary outbreak in Cuba, Castillos being under suspicion by the Spanish authorities, intrusted to the United States consul at Habana, Cuba, 3,000 ounces of Spanish gold of value of $51,000 for safe-keeping until called for. This deposit was evidenced by a receipt of the consulate, whereby it appeared that said gold was placed on board the United States flagship *Contoocook*. It is further averred that neither said

Castillos nor any of his heirs or legal representatives has ever made any demand for said gold before the bringing of this suit, and, though the petition is somewhat obscure upon that point, we assume that it is claimed that no part of said gold or its value has ever been paid to either said Castillos or anyone authorized to receive the same. It should be added that the record produced on the trial of this case shows that gold of the value alleged was received by Capt. Balch, then commanding the flagship *Contoocook*, about the time alleged, from some party while said flagship was in the harbor of Habana.

For the exoneration of Capt. (now Admiral) Balch from all wrong in this matter it should be stated that upon the trial of this case it was shown conclusively that very soon after he received it he turned over the gold in question to a party who he at least had good reason to believe was entitled to receive it; but as we think this case turns upon the question of jurisdiction the merits of the case are not considered.

Findings of fact were requested by both plaintiff and defendant in the Court of Claims. No such findings were made.

From the judgment of the Court of Claims an appeal was taken to this court.

ARGUMENT.

THERE ARE NO FACTS BEFORE THE COURT ON WHICH A JUDGMENT CAN BE BASED.

The court below, in stating the facts in its opinion, preparatory to discussing the law of the case, took part of its facts from appellant's petition and part from the record in the Court of Claims. Each and every allegation of the petition had been denied by the Government. The court, therefore, was required to find all of its facts from the record. The case was heard on merits and a finding of facts established by the evidence should have been made, with a conclusion of law upon said facts, and the said finding of facts and conclusion of law should have been certified as part of the record here. (Rule No. 2 Relating to Appeals from the Court of Claims.) There is, therefore, no finding of facts upon which this court can act.

THE LAW CREATES NO LIABILITY ON THE PART OF THE UNITED STATES TO REIMBURSE PERSONS FOR LOSSES RESULTING FROM THE DEPOSIT OF GOLD, SILVER, AND JEWELS WITH COMMANDING OFFICERS OF UNITED STATES WAR VESSELS.

The Constitution of the United States provides (Art. 1, Sec. 8) that "The Congress shall have power to make rules for the government and regulation of the land and naval forces." Congress under this power granted by the Constitution delegated to the

heads of the executive departments authority to issue regulations for the government of their respective departments not inconsistent with law as follows:

> SEC. 161. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

The authority, however, to receive gold, silver, and jewels on board United States war vessels for freight or safe-keeping was granted directly by Congress by paragraph 13, article 8, section 1624 of the Revised Statutes, which reads:

> Such punishment as a court-martial may judge may be inflicted on any person in the Navy * * * who * * * takes, receives, or permits to be received, on board the vessel to which he is attached, any goods or merchandise, for freight, sale or traffic, except gold, silver, or jewels, for freight or safe-keeping; or who demands or receives any compensation for the receipt or transportation of any other articles than gold, silver, or jewels, without authority from the President, or Secretary of the Navy.

This statute, by necessary implication, gave to any person in the Navy attached to a United States vessel the right to receive gold, silver, and jewels for freight or safe-keeping, and to demand and receive compensation for such service. The compensation under

the act clearly belongs to such persons and in no event becomes the property of the United States.

This court, after similar reasoning in construing section 44 of the act of June 30, 1864 (13 Stat. 239), carried into Revised Statutes as section 3220, which provided that judgments against collectors or deputy collectors recovered in any court for taxes illegally or erroneously assessed and collected by them, together with expenses and costs of such suits, should be repaid to such collectors or deputy collectors by the Commissioner of Internal Revenue, said that the statute by necessary implication authorized suits against collectors to recover taxes illegally or erroneously collected by them. (*City of Philadelphia* v. *The Collector*, 5 Wall. 720, 731.)

The Secretary of the Navy in carrying out the above provision of section 1624 of the Revised Statutes, on April 18, 1865, issued the following regulation, which was in force when the transactions out of which this suit arose occurred:

> "209. When gold, silver, or jewels shall be placed on board any vessel of the Navy for freight or safe-keeping, the commander of the vessel shall sign bills of lading for the amount and be responsible for the treasure. The usual percentage shall be demanded from the shippers of the treasure, and its amount shall be divided as follows: One-fourth to the commander in chief of the squadron to which the vessel may belong; one-half to the commander of the vessel; one-fourth to the Navy pension fund. But in order to entitle the

> commander in chief of the squadron to receive any part of the amount he must have signified to the commander of the vessel, in writing, his readiness to unite with him in the responsibility for the care of the treasure. When a commander in chief of a squadron does not participate in a division of the amount, then two-thirds of the whole of it shall inure to the commander of the vessel, and the remainder to the Navy pension fund."

The lower court erroneously referred to paragraph 1020 of the regulations of October 1, 1869 (Rec. 4), which contained no provision for sharing responsibility for the care of the treasure with the commander in chief of the squadron as did paragraph 209 of the regulation of April 18, 1865.

It was clear that some regulation was necessary in order to carry out the provisions of the statute and to prevent confusion and disagreements as to who should receive compensation. The regulation in question was reasonable and fair and in perfect harmony with the purpose manifested by Congress in framing the act, and in a proper sense had the force of law. (*Ex Parte Reed*, 100 U. S. 13, 22; *U. S.* v. *Eaton*, 144 U. S. 677, 688.) The Secretary of the Navy had no authority, if he had so intended, to change the statute so as to make the United States responsible for the safe-keeping of the articles specified. (*Morrill* v. *Jones*, 106 U. S. 466, 467.)

The evident purpose of the regulation was to make the officer to whom the treasure was intrusted responsible to the owner for its safe-keeping, and any

other construction would be inconsistent with the object for which the law was enacted. There was no intention on the part of Congress to make the United States liable for any loss that might occur by reason of the trust.

The court below dismissed the petition upon the ground that it had no jurisdiction of the suit, as the money was not paid into the Treasury, nor to an officer entitled to receive it for the use and benefit of the United States, and was in fact not in the custody or possession of the United States or any of its officers at the time the suit was filed.

CONCLUSION.

The Government submits that there is no finding of facts in the record before this court and therefore no case for it to consider. That if the opinion is resorted to for facts, then it is shown conclusively that the money in question was returned to persons entitled to receive it. (Rec. 4.) That even if the court has jurisdiction of the suit, the question on which the jurisdiction depends is so frivolous as to need no further argument (97 U. S. VII; *Hinckley* v. *Morton*, 103 U. S. 764–766) and the appeal should be dismissed or the judgment of the court below affirmed.

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